

Supreme Court of the United States
OCTOBER TERM, 1965

No. 29

UNITED STATES, APPELLANT

vs.

CLARENCE EWELL AND RONALD K. DENNIS

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

I N D E X

Original Print

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the Southern District of Indiana, Indianapolis Di-
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IP 64-Cr-33

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[fol. 3]

**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

[File Endorsement Omitted]

No. IP 64-Cr-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

INDICTMENT—filed March 26, 1964

Count I-26 U.S.C. 4705(a)

The Grand Jury charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully, wilfully, and knowingly sell 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate; in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotic Control Act of 1956.

Count II-26 U.S.C. 4704(a)

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the

Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotic Control Act of 1956.

[fol. 4] Count III-21 U.S.C. 174

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did receive, conceal, facilitate the transportation and concealment of, and sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Title 21, United States Code, Section 174, as amended by the Narcotic Control Act of 1956.

A True Bill:

/s/ [Illegible]
Foreman

/s/ Richard P. Stein
United States Attorney

[fol. 5] * * *

[fol. 6]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

Cause No. IP 64-CR-33

UNITED STATES OF AMERICA, PLAINTIFF

v8

CLARENCE EWELL, DEFENDANT

MOTION TO DISMISS INDICTMENT—filed May 28, 1964

Comes now the defendant in the above cause by his court-appointed counsel and moves the Court pursuant to Rule 12b of the Federal Rules of Criminal Procedure, to dismiss the indictment on the following grounds:

1. The defendant has been in jeopardy of conviction of the offense charged therein in the case of United States of America v. Clarence Ewell in the District Court for the Southern District of Indiana, Indianapolis Division, Cause Number IP 62-CR-192 terminated December 18, 1962.

/s/ David B. Lockton
Attorney for Defendant

ICE MILLER DONADIO & RYAN
111 Monument Circle, 10th Fl.
Indianapolis, Indiana
MElrose 6-4401
Of Counsel

[fol. 7]

* * * * *

[File Endorsement Omitted]

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
INDICTMENT—filed May 28, 1964

I.

Statement Of The Facts

On December 14, 1962, the Grand Jury of the Southern District of Indiana returned an indictment charging the defendant with a violation of title 26 United States Code Section 4705a. On December 18, 1962, the defendant was arraigned before this court in Cause No. IP 62-CR-192. At that time he entered his plea of guilty to this indictment and was sentenced under the mandatory sentencing provisions of the Internal Revenue Code, 26 U.S.C. 72 37b, to the minimum sentence of ten years without possibility of probation or parole. The defendant was committed to the federal penitentiary at Terre Haute, Indiana and remained there until January 13, 1964. At that time this court vacated the judgment and sentence of December 18, 1962 and ordered the prisoner to be released. This release was pursuant to the defendant's Motion to Vacate and Set Aside Judgment and Sentence on the grounds that the indictment in his case was defective in that the government had failed to furnish in the indictment itself, the name of the purchaser whom Clarence Ewell was alleged to have sold narcotic drugs.

Immediately upon his discharge from the federal penitentiary and before ever actually obtaining his freedom, the defendant was rearrested and charged with the identical violation of the Internal Revenue Law based on [fol. 8] the identical set of facts, and for said alleged violation he had already served one year in prison. Since this time until the present, the defendant has been incarcerated in the Marion County Jail.

On March 26, 1964, the Grand Jury returned an indictment in three counts based on the same alleged facts as

in Cause No. IP 62-CR-192. This present indictment, Cause No. IP 64-CR-33, charges violations in Count I of 26 U.S.C. 4705a, Count II of 26 U.S.C. 4704a, and in Count III of 21 U.S.C. 174. On April 23, 1964, the defendant appeared before this court and the undersigned was appointed as his counsel. The defendant then pleaded not guilty to each of the counts in the indictment and reserved until this time the right to file a motion attacking this indictment.

* * * *

[fols. 9-12] * * *

[fol. 13]

* * * *

Respectfully submitted,

/s/ David B. Lockton
Attorney for Defendant

* * * *

[fol. 14]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-CR-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

BRIEF IN OPPOSITION TO MOTION TO DISMISS—filed
June 24, 1964

Defendant, Clarence Ewell, has filed a motion to dismiss the indictment in the above-entitled cause. The Government respectfully submits that said motion is devoid of merit and should be denied.

I.

STATEMENT OF FACTS

On December 14, 1962 the defendant was charged in a one-count indictment with the unlawful sale on or about October 31, 1962 of 400 milligrams, more or less, of heroin hydrochloride not in pursuance of a written order from the buyer in violation of Title 26, U.S.C. Section 4705(a). The defendant entered a plea of guilty to the charges and on December 18, 1962 he was sentenced to a term of imprisonment for a period of 10 years as a second offender.

In November, 1963 the defendant filed a motion to vacate and set aside sentence on the grounds that the indictment, upon which he entered a plea of guilty, was insufficient because it failed to name the person to whom he

was alleged to have sold the narcotics. In his supporting brief the defendant argued, *inter alia*, that because the indictment omitted the name of the purchaser, he would be unable to plead the judgment as a bar in any subsequent prosecution for the same offense. The Government filed its opposition brief and after the case had been argued by both parties, the Court entered an order on January 15, 1964 releasing the defendant from custody. The Court concluded that because the indictment failed to name the purchaser, such indictment failed to charge an offense of any kind. The Court further concluded that the sentence imposed on the defendant's plea of guilty was a nullity and that the Court was without jurisdiction to enter such judgment and sentence.

[fol. 15] Immediately after the defendant's release, he was rearrested and charged with the same offense for which he was previously convicted and sentenced. On March 26, 1964 the Grand Jury returned an indictment charging the defendant in three counts with the illegal sale of narcotics. In Count I the defendant was charged with the unlawful sale on or about October 31, 1962 of 400 milligrams, more or less, of heroin hydrochloride to Cornelius C. Cooper not in pursuance of a written order from Mr. Cooper in violation of Title 26 U.S.C. Section 4705(a). In Count II the defendant was charged with the unlawful sale of the same narcotic drug to Cornelius C. Cooper not in or from the original stamped package in violation of Title 26 U.S.C. Section 4704(a). In Count III the defendant was charged with receiving, concealing and selling the same narcotic drug to Cornelius C. Cooper which had been previously imported into the United States contrary to law in violation of Title 21, U.S.C. Section 174.

On May 28, 1964 the defendant filed a motion to dismiss the instant indictment on the grounds that such indictment places him in "double jeopardy" and thereby violates his constitutional rights under the Fifth Amendment.

* * * *

[fols. 16-18] * * *

[fol. 19]

* * * *

Respectfully submitted,

RICHARD P. STEIN
United States Attorney

By: /s/ Robert W. Geddes
ROBERT W. GEDDES
Assistant United States Attorney

[Certificate of Service (omitted in printing)]

[fol. 20]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

Cause No. IP 64-CR-33

UNITED STATES OF AMERICA, PLAINTIFF

vs

CLARENCE EWELL, DEFENDANT

AMENDED MOTION TO DISMISS INDICTMENT—filed
July 7, 1964

Comes now the defendant in the above cause by his court-appointed counsel and states that on May 28, 1964, a Motion To Dismiss Indictment was filed before this court. This Motion hereby incorporates the previous motion by reference and the defendant moves the court to dismiss the indictment on the following additional ground:

2. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

/s/ David B. Lockton
Attorney for Defendant

* * * *

[fol. 21]

* * * * *

[File Endorsement Omitted]

BRIEF IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO
DISMISS INDICTMENT—filed July 7, 1964

* * * * *

II.

The Defendant Has Been Denied His Right To A Speedy
Trial Guaranteed By The Sixth Amendment

The relative part of the Sixth Amendment states the following:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .”

As pointed out above, Clarence Ewell, through no fault of his own, has been awaiting justice since December 14, 1962, the date of his original indictment. In the plain and simple language of the Sixth Amendment, he has obviously been denied the right to a speedy trial.

The Supreme Court in recent years has seen fit to place a limitation on the right to a speedy trial. In *Pollard v. United States*, 352 U.S. 354, 361³ 62, (1957) the court stated the delay must be “purposeful” or “[fol. 22] oppressive”. Other cases have held the defendant must be prejudiced by the delay. Even with this judicial limitation, however, the rights of Clarence Ewell have clearly been violated.

In the first place, a defendant is not required to show prejudice when asserting his constitutionally right under the Sixth Amendment. *Taylor v. United States*, 238 F. 2d 259 (D.C. Cir. 1956); *Petition of Provoo* 17 F.R.D. 183, 203 (D. Md. 1955) affirmed 350 U.S. 857 (1955); *United States v. Lustman*, 258 F.2d 475 (2nd Cir. 1958), cert. denied 358 U.S. 880 (1958). On the contrary, the Government bears the burden of proving “that the accused suffered no serious prejudice beyond that which en-

sued from the ordinary and inevitable delay." *Williams v. United States*, 250 F.2d 19, 21 (D.C. Cir. 1957). It is presumably obvious that the Government cannot sustain this burden, for the defendant has been prejudiced in two ways.

First, the long delay has prejudiced Clarence Ewell's case. For a detailed analysis of how the intervention of the relative short period of time of two months can prejudice the case of a man charged with the sale of narcotics, in a fact situation very similar to the present one, see the concurring opinion of Judge Wright in *Nickens v. United States*, 323 F.2d 808 (D.C. Cir. 1963) pp. 813-814.

Secondly and more importantly, the defendant has been prejudiced by his unduly long imprisonment and his harassment by successive indictments. As the court stated in *Petition of Provo*, *supra* at 198:

"Prejudice may arise from the restraint on liberty for an unreasonable length of time before a conviction, from the harassment of criminal prosecution and anxiety resulting therefrom, and from the possible loss of witnesses by reason of faded memory and inability to locate them."

[fol. 23] As to the other limitations, while it might not be precisely accurate to say the delay was "purposeful", it was nevertheless a result of the government's express policy of protecting informers by keeping their names from indictments, and the Seventh Circuit's subsequent interpretation of this practice as being unconstitutional is in *Lower vs United States*, 320 F.2d 187 (7th Cir. 1963).

In any event, the delay is definitely "oppressive" in this case, due to the fact that the defendant has been denied his freedom since December of 1962, to the present time. As noted in Part I above, this time could not be counted towards any subsequent sentence, and in effect amounts to punishment for no lawful reason.

The defendant therefore respectfully submits that the court exercise its judicial discretion and dismiss the pres-

ent indictment on the additional ground that the defendant has been denied his right to a speedy trial.

/s/ David B. Lockton
Attorney for Defendant

* * * *

[Certificate of Service (omitted in printing)]

[fol. 24]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-CR-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

SUPPLEMENTARY MEMORANDUM IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO DISMISS
THE INDICTMENT—filed July 8, 1964

The defendant has moved to dismiss this indictment for the additional reason that a trial upon this indictment would result in the denial of his right to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States. The facts have been fully stated in the Government's brief filed June 24, 1964 and will not be repeated here.

Under a factual situation strikingly similar to the one disclosed here, the United States District Court for the District of Columbia has rejected a denial-of-speedy-trial argument. *United States v. Shelton*, 211 F. Supp. 869 (D.C. 1962) reversed on other grounds 327 F.2d 601 (D.C. Cir. 1963). That case involved a delay of six years between the original indictment and trial under a second indictment. There, as here, the delay was held to be "wholly attributable to the ordinary and necessary processes of justice." There, as here, the wording of the original indictment was entirely proper under the existing law until an appellate court declared the law to be otherwise.

The right to a speedy trial is a relative right. It is consistent with delays and depends upon circumstances. *United States v. Graham*, 289 F.2d 352 (7th Cir. 1964); *Pollard v. United States*, 352 U.S. 354 (1957). Under the circumstances of this case, the defendant has not been denied his right to a speedy trial.

RICHARD P. STEIN
United States Attorney

By: /s/ David W. Mernitz
Assistant United States Attorney

[fol. 25]

[Certificate of Service (omitted in printing)]

[fols. 26-27] * * *

[fol. 28]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-Cr-33

UNITED STATES OF AMERICA, PLAINTIFF

v8

CLARENCE EWELL, DEFENDANT

ORDER DISMISSING INDICTMENT, ETC.—July 13, 1964

This case is before the Court for ruling on defendant's amended motion filed July 7, 1964 to dismiss the indictment in three counts returned in this Court on March 26, 1964. The grounds of the motion are quoted as follows:

"1. The defendant has been in jeopardy of conviction of the offense charged therein in the case of United States of America v. Clarence Ewell in the District Court for the Southern District of Indiana, Indianapolis Division, Cause Number IP 62-CR-192 terminated December 18, 1962.

2. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States."

The history of the legal proceedings to which the defendant has been subjected for the alleged involvement with narcotics on or about October 31, 1962 in Indianapolis, Indiana, is necessary to reach a conclusion on the two grounds of the motion. The Court takes judicial notice of the following from its records in the case entitled, United States of America v. Clarence Ewell, IP 62-Cr-192; Clarence Ewell v. T. Wade Markley, Warden, United States Penitentiary, Terre Haute, Indiana, TH 63-C-104; United States of America v. Clarence Ewell, IP 64-Cr-33; and United States of America v. Lauer, EV 59-Cr-27,

(7th Cir. 1961) 287 F.2d 633; Lauer v. United States, (7th Cir. 1963), 320 F.2d 187:

[fol. 29]

December 10, 1962

The complaint of United States of America v. Clarence Ewell was filed charging narcotics violation on or about October 31, 1962 of Title 26 U.S.C. § 4705(a).

December 12, 1962

Mr. Ewell was arrested on a warrant based on such complaint of December 10, 1962 and taken before the United States Commissioner the same date and after appropriate proceedings Mr. Ewell was remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

December 14, 1962

One count of the indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled United States of America v. Clarence Ewell, IP 62-Cr-192, which is quoted as follows:

"INDICTMENT"

The Grand Jury charges:

That on or about October 31, 1962, at Indianapolis, in the Indianapolis Division of the Southern District of Indiana, Clarence Ewell, the defendant herein, did knowingly, wilfully and unlawfully sell a narcotic drug as defined in Title 26 United States Code, Section 4731(a), to-wit: 400 milligrams, more or less, heroin hydrochloride, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by The Secretary of the Treasury or his delegate, in violation of Title 26 United States Code, Section 4705(a)."

A bond of \$10,000.00 was set by the Court. A praecipe for a warrant for the arrest of Mr. Ewell to answer the charge in this indictment was presented to the Clerk of this Court.

December 17, 1962

The Clerk issued a warrant to the United States Marshal who duly served such warrant on Mr. Ewell and placed him in custody.

December 18, 1962

The following proceedings were had in open Court:

"Comes now the attorney for the government, and the defendant appears in person and without coun- [fol. 30] sel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appoints David B. Lockton, a member of the bar of this Court, to represent him.

The Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant having received a copy of the Indictment and having waived the reading of same, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the Indictment, for plea, says that he is guilty as charged. No presentence investigation ordered."

After the defendant entered such plea of guilty to the indictment of December 14, 1962, the government then filed in open Court in the presence of defendant and his counsel the following charge:

**"MEMORANDUM OF PRIOR NARCOTICS
CONVICTION**

Comes now the United States of America by Richard P. Stein, United States Attorney for the Southern

District of Indiana, and David W. Mernitz, Assistant United States Attorney, and pursuant to 26 U.S.C. 7237(c)(2) respectfully shows to the Court that Clarence Ewell, the defendant herein, was convicted on April 5, 1956 on his plea of guilty to the offense of purchase and sale of a narcotic drug not in the original stamped package and not having the tax-paid stamp affixed thereto in violation of Title 26, United States Code, Section 4704(a), which offense is counted as a prior offense under 26 U.S.C., Section 7267(c)(1) for purposes of sentencing under 26 U.S.C. 7237(b)."

Whereupon, the Court rendered judgment which is quoted as follows:

"On this 18th day of December, 1962 came the attorney for the government and the defendant appeared in person and by David B. Lockton, his court appointed attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of unlawfully selling a narcotic drug, to-wit: 400 milligrams, more or less, heroin hydrochloride, without a written order on a form issued for that purpose by the Secretary of the Treasury, on or about October 31, 1962, at Indianapolis, Indiana, in violation of Title 26 U.S.C., Section 4705(a), as charged in the Indictment, and upon his plea of guilty to the Memorandum of Prior Narcotics Conviction filed by the government this date, in that the defendant was convicted on April 5, 1956, on his plea of guilty to the offense of selling a narcotic drug in violation of Title 26 U.S.C., Section 4704(a), which offense is counted as a prior offense under 26 U.S.C., Section 7267 (c)(1) for purpose of sentencing under 26 U.S.C. 7237(b). And the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

[fol. 31] IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CALE J. HOLDER
United States District Judge."

July 17, 1963

Seventh Circuit Court of Appeals published its opinion in the case of Lauer v. United States of America, 320 F.2d 187 in which it held that an indictment charging an offense under Title 26 U.S.C. § 4705(a) does not state an offense unless it named the buyer of narcotics from the defendant-seller.

September 6, 1963

Defendant requested a copy of the indictment of December 14, 1962.

September 27, 1963

A copy of the indictment of December 14, 1962 was mailed by the Clerk to Mr. Ewell in the United States Penitentiary, Terre Haute, Indiana.

November 6, 1963

The case of Clarence Ewell v. T. Wade Markley, Warden, United States Penitentiary, Terre Haute, Indiana, TH 63-C-104, was filed.

January 13, 1964

Judgment in accordance with the following quoted findings of fact and conclusions of law was entered in TH 63-C-104:

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on the issues of the petitioner's 'Motion To Vacate And Set Aside Judgment And Sentence' filed November 6, 1963; and the respondent's brief in opposition filed December 30, 1963 and supplemental brief filed December 31, 1963.

[fol. 32] **FINDINGS OF FACT**

1. The petitioner is now and was at the time of instituting this action an inmate of the United States Penitentiary at Terre Haute, Indiana, and in the custody of the respondent.
2. The petitioner is in such custody by reason of a sentence of this Court on December 18, 1962 for the term of ten years in Cause Number IP 62-Cr-192 for the violation of Title 26 U.S.C. Section 4705(a) and a second offender pursuant to Title 26 U.S.C. Section 7237(c) (2).
3. Such sentence was rendered on an indictment charging petitioner with a violation of Title 26 U.S.C. Section 4705(a) after a plea of guilty. The indictment failed to set forth the name of the person to whom the alleged unlawful sale of narcotics was made and did not contain any allegations which would properly excuse or overcome such omission.

CONCLUSIONS OF LAW

1. The indictment failed to charge an offense of any kind. *Lauer v. United States*, (7th Cir. 1963), 320 F.2d 187.
2. The sentence of this Court on the plea of guilty to such indictment is a nullity.

3. The Court was without jurisdiction to enter such judgment and sentence.

4. The petitioner's Motion is sustained and this Court's judgment and sentence of December 18, 1962 in United States of America v. Clarence Ewell, Cause Number IP 62-Cr-192 is vacated and set aside on authority of Lauer v. United States, (7th Cir. 1963), 320 F.2d 187. The respondent is directed to release Clarence Ewell from custody previously authorized by such judgment of December 18, 1962 in such cause.

The Clerk will enter judgment in accordance with these findings and conclusions.

Dated this 13 day of January, 1964.

CALE J. HOLDER, Judge, United States District Court Southern District of Indiana"

January 13, 1964

The complaint of United States of America v. Clarence Ewell, Commissioner's Docket No. 2, Case No. 101, filed in the Indianapolis Division, United States District Court, Southern District of Indiana, charging narcotics violations on or about October 31, 1962 of Title 26 U.S.C. §§ 4704 (a) and 4705(a).

[fol. 33]

January 16, 1964

Mr. Ewell upon release from the United States Penitentiary was taken before the United States Commissioner in the Terre Haute Division of this Court, and after appropriate proceedings Mr. Ewell was temporarily remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

January 27, 1964

Mr. Ewell was taken before the United States Commissioner in the Indianapolis Division of this Court, and after appropriate proceedings Mr. Ewell was finally re-

manded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

March 26, 1964

A three count indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled, United States of America v. Clarence Ewell, IP 64-Cr-33, which is quoted as follows:

"INDICTMENT"

Count I-26 U.S.C. 4705(a)

The Grand Jury charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully, wilfully, and knowingly sell 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate; in violation of Title 26, United States Code, Section 4705 (a), as amended by the Narcotic Control Act of 1956.

Count II-26 U.S.C. 4704(a)

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did unlawfully sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotic Control Act of 1956.

[fol. 34] Count III—21 U.S.C. 174

The Grand Jury further charges:

That on or about October 31, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Clarence Ewell, did receive, conceal, facilitate the transportation and concealment of, and sell to Cornelius C. Cooper, 400 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Title 21, United States Code, Section 174, as amended by the Narcotic Control Act of 1956."

A bond was fixed by the Court in the sum of \$10,000.00.

March 27, 1964

A praecipe for a warrant for the arrest of Mr. Ewell to answer the charge in this indictment was presented to the Clerk of this Court.

March 30, 1964

The Clerk issued a warrant to the United States Marshal who duly served such on Mr. Ewell and placed him in custody.

April 23, 1964

The following proceedings, as quoted from the entry of this date, were had in open Court:

"Comes now the attorney for the government and the defendant appeared in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he wants an attorney, the Court appoints David B. Lockton, a member of the bar of this Court, to represent him.

After having conferred with counsel, the Court explains to the defendant the nature of the charge and the rights afforded him under the Constitution and after being fully advised, the defendant having heretofore received a copy of the indictment and the same having been read to him in open court by the attorney for the government, now states that he thoroughly understands the nature of the charge and being arraigned upon the indictment, for plea, says that he is not guilty as charged in all three counts.

The defendant's oral motion for time to file any pleadings addressed to the indictment is granted to and including May 18, 1964; the government to file its answer brief fifteen days thereafter, and the defendant to file his reply brief ten days thereafter."

[fol. 35]

May 14, 1964

Defendant's counsel filed a motion for extension of time of ten days from May 18, 1964 within which to file motions addressed to the indictment. The request was consented to by the United States District Attorney.

May 18, 1964

The Court granted the request of the defendant of May 14, 1964 for a ten day extension of time.

May 28, 1964

Defendant filed a motion to dismiss the indictment of March 26, 1964. Defendant also filed a brief in support thereof.

June 9, 1964

The United States District Attorney requested an extension of time to June 27, 1964 to file an answer brief to the brief of defendant filed May 28, 1964.

June 12, 1964

The Court granted the request of the government of June 9, 1964, and time to file the answer brief was extended to June 27, 1964.

June 24, 1964

The United States of America filed its answer brief.

July 6, 1964

The defendant filed his reply brief.

July 7, 1964

The defendant filed an amended motion to dismiss the indictment of March 26, 1964. Defendant filed a brief in support thereof.

Mr. Ewell has been in continuous confinement from the date of his first arrest on December 12, 1962 to the date of this entry and will remain in such confinement until the trial thereof in September 1964 depending upon the action taken on this motion and appeals therefrom. This is a total of one year and approaching seven months. During the period of Mr. Ewell's confinement from December 18, 1962 to January 13, 1964, there was no opportunity for bail as the procedural laws of the United States made no provision therefor even though he was during this time illegally held on a judgment based on an indictment which did not charge a crime. During the period from December 10, 1962 to December 18, 1962, he was confined because of being unable to post the required bail of \$10,000.00 to answer to a complaint and indictment which did not charge a crime.

Prior to the July 17, 1963 decision of Lauer v. United States of America, 320 F.2d 187, the defendant and the United States Attorney believed that an indictment in the language of the statute defining the offense was the substantive and procedural law of the land. The government intentionally avoided using the prosecuting witnesses' names in all narcotic indictments. After July 17, 1963 and the Lauer decision, Mr. Ewell was faced with a confusing state of jurisprudence as were a number of defendants serving lengthy terms under similar indictments. Mr. Ewell could serve out his term of years based on a void judgment, or challenge the judgment immediately, or challenge the judgment after the statute of limitations had expired, or challenge the judgment after

serving out his full term of the void judgment. In view of Title 18 U.S.C.A. §§ 3288 and 3289, there was no choice to Mr. Ewell but to challenge the judgment immediately.

The government had full knowledge of the effect of the July 17, 1963 Lauer decision on the judgment and took no action whatever in expunging or vacating such Ewell judgment, nor in submitting the matter to the August and December 1963 terms of the Grand Jury and waited until defendant successfully took action to vacate the judgment.

The government then, for some reason unknown of record other than the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons, caused the Grand Jury in March 1964 to reindict Mr. Ewell for three narcotic offenses allegedly occurring [fol. 37] on the same date growing out of the same transaction whereas the first indictment was for one narcotic offense allegedly occurring on the same date and apparently the same transaction referred to in the three offenses in the three count indictment.

This is not a case for charges of neglect against the government, or the defendant, Mr. Ewell. It is litigation resulting from inconsistencies in the developing law that cries out for relief to the defendant, Mr. Ewell. Mr. Ewell was not a belligerent offender. He pleaded guilty within four days of the indictment to get his jail term over. Mr. Ewell has served bailable and unbailable time in County Jails and Federal Penitentiaries since December 12, 1962, none of which time served can or will be credited to the lengthy mandatory sentence if defendant is convicted. Title 26 U.S.C.A. § 7237(b) (c) (d) and Title 18 U.S.C.A. § 3568. If he is acquitted, he will already have served penitentiary time when there was no legal commitment.

The rights of Mr. Ewell under the Sixth Amendment of the United States Constitution quoted in part as follows has been violated by the combined events recited herein:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *, and

to be informed of the nature and cause of the accusation; * * *."

The Court now GRANTS the amended motion to dismiss the indictment as based on ground two and DENIES the motion as based on ground one. The indictment consisting of three counts returned March 26, 1964 is dismissed and the United States Marshal is ORDERED to release the defendant forthwith.

Dated this 13 day of July, 1964.

/s/ Cale J. Holder
Judge, United States District
Court Southern District of Indiana

[fol. 38]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-CR-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

PETITION FOR REHEARING AND REQUEST FOR ORAL
ARGUMENT—filed July 22, 1964

Comes now the United States of America by Richard P. Stein, United States Attorney for the Southern District of Indiana and David W. Mernitz, Assistant United States Attorney, and petitions this court for a rehearing

on the defendant's motion to dismiss the indictment as amended on July 7, 1964, which motion was granted by this court on July 13, 1964.

In support of this petition for rehearing, the United States relies upon the following grounds and circumstances:

1. The defendant's amended motion to dismiss the indictment, raising for the first time the contention that the defendant had been denied his right to a speedy trial in violation of the Sixth Amendment of the United States Constitution, was filed on July 7, 1964. The court having informally indicated to the parties its intention and desire to render an early ruling upon the defendant's motion, the United States did not have an adequate opportunity to present to the court all the arguments and authorities relevant to the court's decision, although it did file a brief response to the defendant's amended motion, citing certain cases and authorities which it believed would sufficiently answer the defendant's amended motion.
2. The decision of this court of July 13, 1964, granting the defendant's motion to dismiss the indictment on the ground that he had been denied his right to a speedy trial in violation of the Sixth Amendment to the United States Constitution, is a decision sustaining a motion in bar which, under the Criminal Appeals Act, Title 18, United States Code, Section 3731, must be appealed on behalf of the United [fol. 39] States directly to the Supreme Court of the United States. This court therefore ought to have the opportunity to hear and consider all relevant authorities and arguments bearing on this question, so that any decision it may reach may be grounded upon reason and the applicable precedents.
3. The court's announced decision of July 13, 1964 is based upon erroneous assumptions of fact and of law.

WHEREFORE, the United States respectfully prays that its petition for rehearing be granted, and for oral argument upon its petition.

RICHARD P. STEIN
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

[Certificate of Service (omitted in printing)]

[fol. 40]

* * * *

[File Endorsement Omitted]

BRIEF IN SUPPORT OF PETITION FOR REHEARING—filed
July 22, 1964

I. Propriety of the Petition for Rehearing

The Supreme Court has recently endorsed the procedure of applying to the District Court for rehearing in those cases in which the statute provides for a direct appeal by the United States from the District Court to the Supreme Court. *United States v. Healy*, 376 U.S. 75 (1964) The Court observed that

to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation—since plenary consideration of a question of law here ordinarily consumes more time than disposition of a petition for rehearing—and could, in some cases, impose an added and unnecessary burden of adjudication upon this Court. 376 U.S. at 80

II. The Defendant Has Not Been Denied His Constitutional Right to a Speedy Trial

Although the facts of this case have been fully stated in the Court's opinion of July 13, 1964 and in earlier pleadings filed herein by the Government, in view of the Court's announced ruling it is appropriate to restate certain of those facts.

On December 12, 1962, the defendant was arrested on a warrant issuing upon a complaint filed two days earlier. Two days after Ewell's arrest, on December 14, 1962, a one-count indictment against him was returned by the Grand Jury. Four days after the return of the indictment, on December 18, 1962, the defendant entered a plea of guilty, and was immediately sentenced for the mandatory minimum (this being a second offense) of ten years.

Eleven months after sentencing, on November 6, 1963, [fol. 41] the defendant filed a motion to vacate his sentence. On January 13, 1964, the Court granted the defendant's motion and ordered him released from custody. The defendant thus served thirteen months imprisonment under what was determined to be an invalid sentence.

On January 13, 1964, a new complaint charging the defendant with narcotics violations was filed and a warrant issued. The defendant was arrested on this warrant on January 16, 1964, and thereafter remained in jail on account of his failure to post bond.

On March 26, 1964, a three-count indictment against the defendant was returned by the Grand Jury, this being the first Grand Jury to sit since the Court's decision of January 13, 1964, vacating the earlier judgment.

On April 23, 1964, the defendant entered a plea of not guilty to the indictment, and a trial setting was subsequently delayed incident to the filing of motions attacking the indictment and the Court's rulings thereon. The defendant thus remained in custody for five months awaiting the processing of the charges initiated against him by the filing of a complaint on January 13, 1964. Taking the view most favorable to the defendant, he was confined for a period of sixteen months, awaiting trial upon a proper indictment.

No absolute period has been or can be established beyond which a defendant's right to a speedy trial will be violated. As the Supreme Court observed in an early case

The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. *It does not preclude the rights of public justice.* *Beavers v. Haubert*, 198 U.S. 77, 87 (1905) (Emphasis supplied)

See also *United States v. Graham*, 289 F.2d 352 (7th Cir. 1961). Under the circumstances there disclosed, the United States Court of Appeals for the District of Columbia held in *Stevenson v. United States*, 278 F.2d 278 (1960), that the defendant had not been denied his right [fol. 42] to a speedy trial by reason of a sixteen month delay between the finding of the indictment and the trial, although he was continuously confined during that period.

Among the factors which this Court must weigh in determining the issue before it is whether the delay was purposeful or oppressive. *Pollard v. United States*, 352 U.S. 354, 361 (1957) There is absolutely nothing in the record before this court which would permit the court to attribute any bad motive or purpose to the United States by reason of its handling of this case.

The Court's announced decision of July 13, 1964 contains the following paragraph:

The government had full knowledge of the effect of the July 17, 1963 Lauer decision on the judgment and took no action whatever in expunging or vacating such Ewell judgment; nor in submitting the matter to the August and December 1963 terms of the Grand Jury and waited until defendant successfully took action to vacate the judgment.

This paragraph implies that the government has some affirmative obligation to seek the setting aside of all judgments of convictions rendered upon indictments similar to that involved in *Lauer v. United States*, 320 F.2d 187 (7th Cir. 1963). It further suggests that the government should have resubmitted the Ewell case to a Grand Jury even while the defendant was then serving a sentence for the same offense. Both of these suggestions are contrary to all of the established principles of criminal jurisprudence.

It has always been the law that constitutional rights are the personal rights of each individual, and each individual must claim such rights for himself. Hence, judicial decisions upholding constitutional rights of an individual may contain broad statements of constitutional and judicial principles having potentially wide application; but any particular such decision has juridical effect only upon the rights of those who are parties to the lawsuit.

[fol. 43] The Court's reference to the reindictment provisions of Title 18, United States Code, Sections 3288 and 3289, suggests that if the defendant had failed to challenge the judgment under which he was then serving his sentence, it might have been open to the government to reindict him for the same offense, and in effect seek a "second pound of flesh." This suggestion is wholly without foundation, for had the defendant elected not to attack the judgment under which he was confined and to serve out his sentence, the indictment would not have been "found defective or insufficient for any cause" within the meaning of the reindictment statutes.

The Court's use of the phrase "void judgment" in speaking of the judgment rendered upon the original indictment against Ewell points up its confusion in this regard. The Seventh Circuit in its *Lauer* decision could not and does not purport to hold that every indictment similar to that in *Lauer* is "void". Rather, it holds that convictions upon such indictments are "vulnerable to attack under Section 2255." In other words, such convictions are not "void" but "voidable", at the option of the defendant. Until and unless a defendant attacks his conviction, it stands unimpeached. Moreover, a defendant who serves out his sentence under such a judgment will be fully protected against again being placed in jeopardy for the same offense. *Bayless v. United States*, 147 F.2d 171 (8th Cir. 1945)

Since the assertion of such rights was up to the defendant Ewell, the government was under no obligation to take any affirmative action to expunge or vacate the judgment. Had it done so, it would have foreclosed any possible further action in connection with the charged

offenses by reason of the constitutional prohibition against double jeopardy. It has long been held that "a defendant, who procures a judgment against him on an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted" (*United States v. Ball*, 163 U.S. 622 (1896)); and conversely, if the setting aside of the judgment is procured *not* at the defendant's [fol. 44] insistence, he may not be retried.

The delay in bringing this defendant to trial upon the offenses charged in the three-count indictment of March 26, 1964 is "wholly attributable to the ordinary and necessary processes of justice." *United States v. Shelton*, 211 F. Supp. 869 (D.C. 1962) reversed on other grounds 327 F.2d 601 (D.C. Cir. 1963). In *Shelton* there was a delay of six years between the original indictment and trial under a second indictment. There, as here, the wording of the original indictment was entirely proper under the existing law until an appellate court declared the law to be otherwise.

It is said, however, that the circumstances of the present case are aggravated by the fact that the defendant has served some 13 months upon judgment which has been set aside and he will not be entitled to credit for that time if he is again convicted.

Several decided cases, recognizing that the rights of public justice demand that "error in the course of a prosecution resulting in conviction calls for correction of the error, not release of the accused," (*Dowd v. Cook*, 340 U.S. 206, 210 (1951)), have declined to hold that the circumstance of imprisonment under a voided judgment requires dismissal on denial-of-speedy-trial grounds.

In *Bayless v. United States*, 147 F.2d 169 (8th Cir. 1945) reversed on rehearing on other grounds, 150 F.2d 236, the defendant was sentenced to 20 years imprisonment upon his plea of guilty to bank robbery. More than 5 years later, his petition for habeas corpus was granted and his conviction set aside. He was thereafter retried, convicted, and again sentenced to 20 years imprisonment. The Court rejected the argument that the defendant had been denied his right to a speedy trial in the following language:

The facts establish that appellant was accorded all the hearings to which he was entitled in orderly course and was not denied the right of a speedy trial. His own action in pleading guilty, which required the imposition of sentence and resulted in his imprisonment, precluded opportunity or occasion for him [fol. 45] to demand a jury trial on the indictment until after the granting of the writ of habeas corpus, and he made no such demand. After the issuance of the writ the trial was had with reasonable dispatch. 147 F.2d at 170

In *United States v. Brest*, 23 F.R.D. 103 (W.D. Pa. 1958) aff'd. 266 F.2d 879 (3rd Cir. 1959), cert. den. 362 U.S. 912 (1960), the defendant was sentenced to three concurrent sentences of life, 25 years and five years upon his pleas of guilty to the offenses of kidnapping, bank robbery, and interstate transportation of a stolen motor vehicle, respectively. After serving 27 months on these sentences, they were vacated upon his motion and he was tried by a jury which again convicted him, whereupon the Court reimposed the same sentences. The argument that the defendant had been denied his right to a speedy trial was rejected.

In *Wzensinski v. Amos*, 143 F. Supp. 585 (N.D. Ind. 1956), the defendant had been indicted for bank robbery just prior to the time he was taken into state custody. He subsequently served seven years in state custody under a sentence which was subsequently voided. The argument that the trial of the defendant on the federal bank robbery charge after his serving seven years on an invalid state sentence would constitute a denial of a speedy trial was rejected.

Another compelling precedent in this area is *United States v. Tateo*, 216 F. Supp. 850 (S.D. N.Y. 1963) reversed and remanded with instructions to reinstate the indictment 32 L W 4476 (June 8, 1964). The defendant was indicted on March 30, 1956 on four counts charging bank robbery. The trial was commenced on May 15, 1956 and after four days of trial the defendant changed his plea to guilty. On June 5, 1956, he was sentenced to a total of 22 years and 6 months imprisonment.

On February 8, 1963, after the defendant had served some 6½ years of his sentence, the judgment of conviction was vacated upon the defendant's motion under 28 U.S.C. 2255. The trial court thereafter dismissed the indictment on the grounds of double jeopardy, and this dismissal was reversed by the Supreme Court. While the speedy-trial question was not argued before the Supreme Court, implicit in the Court's disposition of the case, re-[fol. 46] manding it to the District Court to reinstate the indictment, is the view that the defendant could then be retried upon that indictment without violating his constitutional right to a speedy trial.

The government must point out to the Court and to this defendant that if this Court is wrong in its decision of July 13, 1964, as we have argued here, the delay in bringing this matter to trial will be even further aggravated by that decision, which purports to be based upon the delays arising from "litigation resulting from inconsistencies in the developing law." This Court's announced decision is but another "inconsistency in the developing law."

The Court's announced decision of July 13, 1964 also impliedly criticizes the government for causing the March Grand Jury to reindict the defendant for three separate offenses, whereas he had been charged in the original indictment with only one. An analysis of the new indictment is therefore in order.

Count I charges sale of a narcotic drug not pursuant to a written order on a form issued by the Secretary of the Treasury, in violation of Title 26, United State Code, Section 4705(a). The penalty for this offense, in the case of a second offender (as in Ewell) is prescribed by 26 U.S.C. 7237(b): not less than 10 nor more than 40 years and a fine of not more than \$20,000.

Count II charges sale of a narcotic drug not in or from the original stamped package, in violation of Title 26 United States Code, Section 4704(a). The penalty for this offense, in the case of a second offender, is prescribed by 26 U.S.C. 7237(a): not less than 5 nor more than 20 years, and a fine of not more than \$20,000.

Count III charges receiving and concealing a narcotic drug imported into the United States contrary to law, in

violation of Title 21, United States Code, Section 174. The penalty for this offense, in the case of a second offender, is not less than 10 years nor more than 40 years and a fine of not more than \$20,000.

Count I of this indictment charges the same offense for which the defendant was originally convicted. Because there was some doubt regarding the question of [fol. 47] double jeopardy at the time of the defendant's reindictment, the government felt it advisable to charge other and different offenses which would not be vulnerable to the double jeopardy argument. Count II of the indictment was included because it provides a lesser penalty than the mandatory 10 year sentence which must be imposed under the other two counts.

In recognition of the inequity to this defendant arising from the fact that under the mandatory sentencing provisions of 26 U.S.C. 4705(a) and 21 U.S.C. 174, the court may not give credit for time already served, and upon the authority of and by the direction of the Attorney General, the government now declares that if this court should reconsider its decision of July 13, 1964, and reinstate the indictment herein, the government will, upon a plea or finding of guilty as to Count II of this indictment, for which the minimum mandatory sentence is five years, move for leave of the court to dismiss Counts I and III which carry the mandatory 10 year sentence.

The government has at all times acted in good faith and without design to oppress this defendant by denying his right to a speedy trial. Under the circumstances of this case, the rights of public justice balanced against the rights of this defendant require that the court grant this petition for rehearing and reinstate the indictment in this cause.

Respectfully submitted,

RICHARD P. STEIN
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

[Certificate of Service (omitted in printing)]

[fol. 48]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-CR-33

UNITED STATES OF AMERICA

vs.

CLARENCE EWELL

BRIEF IN REPLY TO GOVERNMENT'S PETITION FOR
REHEARING—filed July 28, 1964

The Government's petition for rehearing raises no new questions of fact or law not previously considered by this Court. The cases of *United States v. Graham*, 289 F. 2d 352 (7th Cir. 1961), *Pollard v. United States*, 352 U.S. 354, 361 (1957), *United States v. Shelton*, 211 F. Supp. 869 (D.C. 1962) reversed on other grounds 327 F. 2d 601 (D.C. Cir. 1963), *Bayless v. United States*, 147 F. 2d 169 (8th Cir. 1945), and *United States v. Tateo*, S. Ct. 328, 32 L.W. 4476 (6/8/64) have all been cited before by the Government in its pleadings.

The *Tateo* case, *supra*, however, was cited as a precedent in support of the Government's contention that the 5th Amendment protection can be waived, and it is hard to understand how the Government can consider *Tateo* *supra*, a "compelling precedent" regarding 6th Amendment rights. This question was not before the Supreme Court, and the Supreme Court has consistently refused to rule on questions not expressly put before it.

The real point the Government seems to be trying to make is in defense of its failure to act after the *Lauer v. United States of America*, 320 F. 2d 187 (1963) decision was handed down on July 17, 1963. In the first place, this was only one of several reasons this Court cited in support its holding that the defendant's right to a speedy

[fol. 49] trial had been denied. Furthermore, the Government's argument on pages 3 and 4 of its Brief that it had no duty to set aside Clarence Ewell's judgment and sentence on its own motion is subject to question. This argument indicates that it would be the Government's position to remain silent, if faced with a situation where a defendant was sentenced to a life term plus one hundred years on an indictment identical to one the Supreme Court declared invalid on its face; and let the defendant die in prison, if he never discovered this particular Supreme Court case. Certainly, this would not advance the "rights of public justice" the government refers to in its brief.

The Government had the powers on its own to set aside the judgment and sentence, and if this were done with the consent of the defendant, no jeopardy attaches under the dismissed indictment. This has been the position of the Government in its Brief In Opposition To Motion To Dismiss.

On the other hand, had the defendant refused to consent to this action, he would have at least been put on notice of his right sooner, and would have had the option to act on his own behalf. The defendant does not mean to imply by this argument that there was anything purposeful in the Government's failing to act immediately after the *Lauer* decision. This Court states in its entry of July 13, 1964, and the defendant agrees that "this is not a case for charges of neglect against the Government or the defendant . . ."

The Government further argues that had the defendant elected to serve out his sentence, the Government could not [fol. 50] re-indict him because "the indictment would not have been 'found defective or insufficient for any cause' within the meaning of the re-indictment statutes." This argument overlooks the possibility that a defendant might have need to attack his sentence later on through a Writ of Error Coram Nobis if the offense constituted a "prior offense" under the Narcotics laws. Since it is the Government's position elsewhere in it's brief that one who has a judgment and sentence set aside on his own motion waives the protection of the double jeopardy clause of the

Fifth Amendment, it is certainly inconsistent to argue to the contrary here.

The Government has also argued in its Brief in Opposition to Motion To Dismiss (page 2) that the Fifth Amendment does not preclude double punishment. It then argues that if Clarence Ewell decided to serve out what is characterized as a "voidable" sentence, he would be fully protected from further punishment, we assume, even if he set his "voidable" judgment of conviction aside on his own motion. The inconsistency of these arguments is also apparent.

The Government's arguments on these points are, therefore, without merit and because the Petition for Rehearing raises no issues not previously considered by this Court, it should be dismissed.

Respectfully submitted

/s/ David B. Lockton

[Certificate of Service (omitted in printing)]

[fol. 51]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-CR-33

UNITED STATES OF AMERICA

vs

CLARENCE EWELL

ORDER DENYING PETITION FOR REHEARING—July 30, 1964

This cause comes before the Court upon the Government's petition for a rehearing and request for oral argument on the defendant's motion to dismiss the Indictment as amended on July 7, 1964, which motion was granted by this Court on July 13, 1964, together with the defendant's brief in reply to the Government's petition for a rehearing.

The Court having heard oral argument and being duly advised in the premises, the Government's petition for rehearing is DENIED on the grounds that there were no erroneous assumption of facts. The Court after a review of the authorities concludes that its entry of July 13, 1964 correctly states the law applicable to this case.

/s/ Cale J. Holder
United States District Judge

[fol. 52]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 64-Cr-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—filed August 28, 1964

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the Order entered in this action on July 13, 1964, rehearing denied July 30, 1964, dismissing the indictment in three counts charging the defendant with narcotics offenses in violation of Title 26, United States Code, Sections 4705(a) and 4704(a), and Title 21, United States Code, Section 174, on the ground that a trial upon such indictment would violate the defendant's right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States.

This appeal is taken pursuant to Title 18, United States Code, Section 3731.

* * * *

III. The following question is presented by this appeal:

[fol. 53] The defendant entered a plea of guilty to a one-count indictment charging a narcotics offense in violation of Title 26, United States Code, Section 4705(a), on December 18, 1962 and was immediately sentenced to the mandatory minimum sentence as a second offender of 10 years. On January 13, 1964, the trial court granted the defendant's motion to vacate that sentence on the ground that the purchaser of the narcotics was not named in the indictment, as required by the decision of the United States Court of Appeals for the Seventh Circuit in Lauer v. United States, 320 F.2d 187, decided July 17, 1963. On March 17, 1964, a new three-count indictment was returned by the grand jury, charging the defendant with

narcotics offenses arising out of the same transactions which were the subject of the 1962 indictment. The question thus presented is whether under these circumstances the trial of this defendant upon the present indictment would violate his right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States.

RICHARD P. STEIN
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

/s/ Robert W. Geddes
Assistant United States Attorney

[fol. 54-55] * * *

[fol. 56]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-CR-33

UNITED STATES OF AMERICA

v.

CLARENCE EWELL

ORDER EXTENDING TIME—October 23, 1964

Upon motion of the United States of America pursuant to Rule 13 of the Supreme Court of the United States, and for good cause shown, the court now orders that the time to docket this case and file the record thereof with the Supreme Court of the United States be extended for a period of 30 days, to and including November 26, 1964.

Dated this 23 day of October, 1964.

/s/ Cale J. Holder
Judge, United States District Court
Southern District of Indiana

[fol. .]

[Court's Certificate to foregoing transcript omitted in printing]

[fol. 58]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-Cr-84

UNITED STATES OF AMERICA

v.

RONALD K. DENNIS

INDICTMENT—filed June 15, 1964

Count I-26 U.S.C. 4705(a)

The Grand Jury charges:

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this court, the defendant, Ronald K. Dennis, did unlawfully, wilfully, and knowingly sell 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate, in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotic Control Act of 1956.

Count II-26 U.S.C. 4704(a)

The Grand Jury further charges:

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this court, the defendant, Ronald K. Dennis, did unlawfully sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original

stamped package, in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotic Control Act of 1956.

[fol. 59] Count III-21 U.S.C. 174

The Grand Jury further charges:

That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did receive, conceal, facilitate the transportation and concealment of, and sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported, in violation of Title 21, United States Code, Section 174, as amended by the Narcotic Control Act of 1956.

A True Bill:

(Illegible)
Foreman

/s/ Richard P. Stein
United States Attorney

[fol. 60]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-Cr-84

UNITED STATES OF AMERICA, PLAINTIFF,

vs

RONALD K. DENNIS, DEFENDANT.

REQUEST FOR APPOINTMENT OF COUNSEL—filed
July 16, 1964

Comes now the defendant in the above entitled action, Ronald K. Dennis, and shows the Court:

1. That on January 29, 1964, in Ronald K. Dennis vs. United States of America, TH64-C-6 in the United States District Court, Southern District of Indiana, Terre Haute Division, the court appointed Donald R. Metz, Indianapolis, Indiana, to represent this defendant in a proceeding under Title 28, U. S. C. § 2255.

2. That on April 13, 1964, the motion to vacate and set aside judgment and brought pursuant to Title 28, U. S. C. § 2255 was granted and this defendant was released from custody.

3. That immediately upon release, this defendant was taken before the United States Commissioner in the Indianapolis Division of this Court and during the proceedings therein, the Commissioner appointed Donald R. Metz to represent this defendant.

4. That Donald R. Metz is thoroughly familiar with the facts of this case and has advised and counselled this defendant since his original appointment on January 29, 1964.

[fol. 61] 5. That this defendant desires that said Donald R. Metz continue to represent him in this matter.

WHEREFORE, this defendant respectfully requests this Court to reaffirm the appointment by the United States Commissioner of Donald R. Metz as counsel for this defendant in this proceeding, and for all other relief proper in the premises.

Dated this 15 day of July, 1964.

/s/ Ronald K. Dennis, Defendant

[fol. 62]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-Cr-84

UNITED STATES OF AMERICA, PLAINTIFF,

v/s

RONALD K. DENNIS, DEFENDANT.

MOTION TO DISMISS INDICTMENT—filed July 16, 1964

Comes now the defendant in the above entitled cause, by counsel, and moves the Court pursuant to Ruling 12-B of the Federal Rules of Criminal Procedure, to dismiss the indictment on the following grounds:

1. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.
2. The defendant has previously been placed in jeopardy for the offenses charge in the indictment herein in the case of United States of America v. Ronald K. Dennis,

No. IP 62-Cr-191, District Court for the Southern District of Indiana, Indianapolis Division.

/s/ Donald R. Metz
Attorney for defendant

Ice Miller Donadio & Ryan
10th Floor, 111 Monument Circle
Indianapolis 4, Indiana
Of Counsel

[Certificate of Service (omitted in printing)]

[fol. 63]

* * * *
[File Endorsement Omitted]

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
INDICTMENT—filed July 16, 1964**

The following is a chronological statement of the facts in this cause:

December 10, 1962

The complaint of the United States of America vs. Ronald K. Dennis was filed charging a narcotics violation on or about September 24, 1962, of Title 28, U. S. C. § 4705(a).

December 12, 1962

The defendant was arrested on a warrant based on such complaint of December 10, 1962, and taken before the United States Commissioner on the same date and after appropriate proceedings was remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

December 14, 1962

One count of the indictment was returned in the United States District Court, Southern District of Indiana,

Indianapolis Division, entitled "United States of America vs. Ronald K. Dennis, IP62-CR-191," which is quoted as follows:

[fol. 64] **"INDICTMENT"**

The Grand Jury charges:

That on or about September 24, 1962, at Indianapolis, in the Indianapolis Division of the Southern District of Indiana Ronald K. Dennis, the defendant herein, did knowingly, wilfully and unlawfully sell a narcotic drug as defined in Title 26, United States Code, Section 4731(a), to-wit: 450 milligrams, more or less, heroin hydrochloride, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by The Secretary of the Treasury or his delegate, in violation of Title 26 of United States Code, Section 4705(a)."

A bond of \$10,000 was set by the Court. Praeclipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of this Court.

December 19, 1962

The Clerk issued a warrant to the United States Marshal who duly charged such warrant on the defendant and placed him in custody.

December 19, 1962

The following proceedings were had in open Court:

"Comes now the attorney for the Government, and the defendant appears in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent him without charge, and the defendant indicating that he does not want an attorney, the defendant executes and files a written waiver of counsel.

The Court explains to the defendant the nature of the charge and the rights awarded him under the Constitution and after being fully advised, the defendant having received a copy of the indictment and the same having been read to him in open court by the attorney for the Government, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the indictment for plea, says that he is guilty as charged. No pre-sentence investigation is directed by the Court."

WHEREUPON, the Court rendered judgment which is quoted as follows:

"On this 19th day of December, 1962, came the attorney for the Government and the defendant appeared in person and without counsel, having on [fol. 65] this date waived counsel. No pre-sentence investigation having been directed by the Court,

"IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U. S. C. Section 4705(a), as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"IT IS ADJUDGED that the defendant is guilty as charged and convicted.

"IT IS ADJUDGED THAT THE DEFENDANT IS HEREBY committed to the custody of the Attorney General or his authorized representative, for imprisonment for a period of Twenty (20) years, and for a study as described in 18 U. S. C. 4208(c), the results of such study to be furnished this Court within three (3) months, whereupon the sentence of

imprisonment shall be subject to modification in accordance with 18 U. S. C. 4208(b).

"IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy of the Judgment serve as the commitment of the defendant.

/s/ William E. Steckler
United States District Judge"

April 2, 1963

The Court entered the following order modifying judgment:

"On this 2nd day of April, 1963, came the attorney for the Government and the defendant appeared in person and without counsel, having heretofore waived counsel. The Court now vacates defendant's waiver of counsel, and appoints George Rich, a member of the bar of this Court, to represent him.

"The defendant having been convicted upon his plea of guilty of the offense of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was [fol. 66] sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U. S. C. Section 4705(a), as charged in the Indictment, and the defendant having on December 19, 1962, been committed to the custody of the Attorney General pursuant to Title 18 U. S. C. 4208(b) for imprisonment for a period of twenty (20) years and for a study as described in 18 U. S. C. 4208(c), and the Court having now received and considered the report of such study, and following the recommendations of the Bureau of Prisons,

"IT IS ORDERED AND ADJUDGED that the period of imprisonment be reduced to Five (5) years.

"IT IS ORDERED that the Clerk deliver two certified copies of this Order Modifying Judgment to the United States Marshal or other qualified officer.

/s/ William E. Steckler
United States District Judge"

July 17, 1963

The Seventh Circuit Court of Appeals published its opinion in the case of *Lauer vs. United States of America*, 320 F. 2d 187, in which it held that an indictment charging an offense of Title 26 U. S. C. § 4705(a) does not state an offense unless it names the buyer of the narcotics from the defendant-seller.

October, 1963

Defendant requested the Court to appoint counsel to represent him.

November 6, 1963

The Court denied defendant's request for the appointment of counsel.

November 12, 1963

The defendant again requested the Court to appoint counsel to represent him indicating that he believed that the *Lauer* case entitled him to have his judgment and sentence vacated and set aside.

[fol. 67] *November 22, 1963*

The Court again refused to appoint counsel to represent the defendant.

January 28, 1964

The case of Ronald K. Dennis vs. United States of America, TH64-C-6, seeks to have the judgment and conviction vacated and set aside pursuant to Title 28 U. S. C. § 2255 was filed.

January 29, 1694

The Court entered its order appointing Donald R. Metz to represent the defendant.

April 13, 1964

The Court entered the following Findings of Fact, Conclusions of Law and Judgment:

"This cause came on for hearing before the Court upon the petitioner's Motion for Relief under Section 2255, Title 28 U. S. C. A.' filed January 28, 1964; the petitioner's Supplemental Motion and Brief filed April 8, 1964; and the respondent's Brief in Opposition filed April 9, 1964. Based upon the motion and briefs submitted, the petitioner's contention is that the indictment upon which he was sentenced and convicted was so defective on its face as to be insufficient to authorize the Judgment of Conviction, since the indictment and record failed to disclose the name of the purchaser to whom he was alleged to have sold the narcotics and he would, therefore, be unable to plead the Judgment as a bar in any subsequent prosecution for the same offense. In response to such assertion, the respondent claims that there is nothing in the record to indicate that the petitioner was prejudiced in any way by virtue of the indictment and record omitting the name of the purchaser and the indictment was sufficient under the general principles of law by which it must be tested.

"The parties having stipulated and agreed that the record in Cause No. IP-62-Cr-191 be admitted and read into evidence, and the Court having read and examined the briefs of both parties and having [fol. 68] heard the arguments of counsel, and being duly advised in the premises, does submit its:

FINDINGS OF FACT

"1. The petitioner is now and was at the time of instituting this action an inmate of the United States Penitentiary at Terre Haute, Indiana, and in the custody of the respondent.

"2. The petitioner is in such custody by reason of a judgment and Commitment Order entered by this Court on December 19, 1962, and modified on April 2, 1963, in Cause No. IP 62-Cr-191, wherein the petitioner received five years for violating Title 26, U. S. C., Section 4705(a).

"3. Such Judgment and Commitment Order was rendered on an Indictment charging petitioner with a violation of Title 26, U. S. C. Section 4705(a) after a plea of guilty. The indictment failed to set forth the name of the person to whom the alleged unlawful sale of narcotics was made and did not contain any allegations which would properly excuse or overcome such omission.

"4. The record does not disclose the name of the purchaser to whom the alleged unlawful sale of narcotics was made.

"5. The case of *Clay v. United States*, 326 F. 2d 196 (10th Cir. 1963), relied upon by the respondent, is distinguishable from the case at bar for the reason that in *Clay* the name of the purchaser was identified in the record.

"Having fully considered the evidence and arguments of counsel, and based upon the foregoing findings of fact, the Court files the following:

CONCLUSIONS OF LAW

"1. By reason of the omission of the name of the alleged purchaser and the lack of any allegation properly executed for overcoming such omission and, on the authority of *Lauer v. United States*, 320 F. 2d 187 (7th Cir. 1963), the Indictment upon which the petitioner entered a plea of guilty was so defective on its face that it failed to charge an offense of any kind, and the Court was without jurisdiction to enter such judgment and sentence.

"2. In view of the Indictment and the record failing to disclose the name of the purchaser to whom the petitioner was alleged to have sold the narcotics, the petitioner is unable to plead the judgment as a bar in any subsequent prosecution for the same offense.

"3. Petitioner's Motion for Relief under Title 28, U. S. C. Section 2255, should be granted. The Judgment and Commitment Order entered on December 19, 1962, as modified on April 2, 1963, in United [fol. 69] States of America v. Ronald K. Dennis, Cause No. IP 62-Cr-191, should be vacated and set aside.

JUDGMENT

"IT IS ORDERED, ADJUDGED AND DECREED, that the Judgment and Commitment heretofore entered in United States of America v. Ronald K. Dennis, Cause No. IP 62-Cr-191, should be and hereby is vacated and set aside. It is further ordered that petitioner, Ronald K. Dennis, by and hereby is immediately released and discharged from further imprisonment or liability under said judgment and commitment.

"Dated: April 13, 1964.

/s/ William E. Steckler
Judge, United States District Court"

April 10, 1964

The complaint of United States of America vs. Ronald K. Dennis, Commissioner's Docket No. 3, Case No. 358, was filed in the Indianapolis Division, United States District Court, Southern District of Indiana, charging narcotics violation on or about September 24, 1962, under Title 26, U. S. C. §§ 4704(a) and 4705(a).

April 13, 1964

The defendant was arrested on a warrant based upon such complaint of April 10, 1964.

April, 1964

The defendant was taken before the United States Commissioner in the Indianapolis Division of this Court and after appropriate proceedings in which Mr. Donald R. Metz was appointed as counsel to represent Mr. Den-

nis, the defendant was remanded to jail because of his not posting bond in the amount duly fixed by the Commissioner.

June 15, 1964

A three-count indictment was returned in the United States District Court, Southern District of Indiana, charging narcotics violation on or about September 24, 1962, of Title 26, U. S. C. §§4704(a) and 4705(a), en-[fol. 70] titled "United States of America vs. Ronald K. Dennis, IP 64-Cr-84, which is quoted as follows:

"INDICTMENT

Count I—26 U. S. C. 4705(a)

"The Grand Jury charges:

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully, wilfully and knowingly sell 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate, in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotics Control Act of 1956.

Count II—26 U. S. C. 4704(a)

"The Grand Jury further charges:

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation

of Title 26, United States Code, Section 4704(a), as amended by the Narcotics Control Act of 1956.

Count III—21 U. S. C. 174

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did receive, conceal, facilitate, the transportation and concealment of, and sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same had been unlawfully imported, in violation of Title 21, United States Code, Section 174, as amended by the Narcotics Control Act of 1956."

June 16, 1964

A praecipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of the Court.

[fol. 71]

June 16, 1964

The Court issued a warrant to the United States Marshal who duly served such on the defendant and placed him in custody.

The defendant remains in custody awaiting arraignment on the indictment of June 15, 1964.

ARGUMENT

The facts in this case, except for differences in dates of the various proceedings, are identical to those in *United States of America v. Clarence Ewell*, No. IP 64-Cr-33, United States District Court, Southern District of Indiana, Indianapolis Division. On July 13, 1964, the Court in the *Ewell* case entered its order dismissing the indictment for the reason that the defendant was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States. The memorandum opinion of the Court in the *Ewell* case is directly

applicable to the present case and, therefore, an attempt has been made to conform the opinion in the *Ewell* case to the present case.

The defendant has been in continuous confinement from the date of his arrest on December 12, 1962, to the present time and will remain in such custody until the disposition of this proceeding. This is a total of over one year and six months. During the period of the defendant's confinement from December 12, 1962, to April 13, 1964, there was no opportunity for bail as the procedural laws of the United States made no provision therefore even though, during this period, he was illegally held on a judgment and sentence based on an indictment which did not charge an offense. During the period from December 12, 1962, to December 19, 1962, he was confined because he was unable to post the required bail in order to [fol. 72] answer a complaint and indictment which did not charge a crime. Prior to the decision of *Lauer v. United States of America*, 320 F. 2d 187, on July 17, 1963, the defendant and the United States Attorney believed that an indictment in the language of the statute defining the offense was valid. The Government intentionally avoided using the prosecuting witnesses' names in all narcotic indictments. After July 17, 1963, and the *Lauer* decision, the defendant was faced with a confusing state of jurisprudence. He could either serve out his sentence which was based on a void judgment, challenge the judgment immediately, challenge the judgment after the statute of limitations had expired or challenge the judgment after serving out his full term of the void judgment and sentence. In view of Title 18, U. S. C. §§ 3288 and 3289, there was no choice for the defendant but to challenge the judgment immediately.

The Government had full knowledge of the effect of the July 17, 1963, *Lauer* decision on the defendant's judgment but took no action whatever to expunge or vacate the defendant's judgment. Nor did the Government submit the matter to the August or December 1963 terms of the Grand Jury and, in fact, waited until defendant had successfully took action to vacate the judgment before seeking a valid indictment. The Government in June of 1964 caused the Grand Jury to reindict the defendant for

three narcotic offenses, all of which were on the same facts which formed the basis for the original proceedings.

The defendant has not been belligerent or an uncooperative offender. As previously noted, he pled guilty to the original indictment. As previously noted, he has remained in custody continuously since December 12, 1962, for the acts charged in the present indictment and none of this time can be credited on the mandatory sentence provided for if the defendant is convicted of the charges contained in the present indictment. Title 26, U. S. C., Section 7237(b) (c) and (d) and Title 18, U.S.C., Sec-[fol. 73] tion 3568 If the defendant is acquitted of the charges contained in the present indictment, he will have served penitentiary time in excess of one and one-half years.

The rights of the defendant under the Sixth Amendment to the United States Constitution quoted in part as follows have been violated by the events heretofore set forth:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and shall be informed of the nature and cause of the accusation"

For all of the following reasons, it is respectfully submitted that the motion to dismiss the indictment returned June 15, 1964, should be granted and the United States Marshal should be ordered to release the defendant forthwith.

Dated this 16 day of July, 1964.

/s/ Donald R. Metz
Attorney for Defendant

ICE MILLER DONADIO & RYAN
10th Floor; 111 Monument Circle
Indianapolis 4, Indiana
Of Counsel

[Certificate of Service (omitted in printing)]

[fol. 74]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

No. IP 64-CR-84

UNITED STATES OF AMERICA

v.

RONALD K. DENNIS

ANSWER IN OPPOSITION TO MOTION TO DISMISS
THE INDICTMENT—filed July 23, 1964

Comes now the United States of America by Richard P. Stein, United States Attorney for the Southern District of Indiana, and David W. Mernitz, Assistant United States Attorney, and in opposition to the motion to dismiss states:

1. The defendant has not been denied his right to a speedy trial.
2. By reason of the defendant's attack upon his conviction in Cause No. IP 62-CR-191, through collateral proceedings under Title 28, United States Code, Section 2255 in Cause No. TH 64-C-6, said conviction has been voided and set aside and no jeopardy has therefore attached.

RICHARD P. STEIN
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

MEMORANDUM

The government herein adopts the argument made in part II of its brief in support of a petition for rehearing filed in United States v. Clarence Ewell, IP 64-CR-33 on the issue of denial of a speedy trial.

United States v. Tateo, 32 L W 4476 (Supreme Court, June 8, 1964) settles the question of double jeopardy contrary to the defendant's position.

RICHARD P. STEIN
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

[fol. 75]

[Certificate of Service (omitted in printing)]

[fol. 76]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-Cr-84

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RONALD K. DENNIS, DEFENDANT

ORDER DISMISSING INDICTMENT, ETC.—July 30, 1964

This case is before the Court for ruling on defendant's motion filed July 16, 1964 to dismiss the indictment in three counts returned in this Court on June 15, 1964. The grounds of the motion are quoted as follows:

"1. The defendant has been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.

2. The defendant has previously been placed in jeopardy for the offenses charged in the indictment herein in the case of United States of America v. Ronald K. Dennis, IP 62-Cr-191 District Court for the Southern District of Indiana, Indianapolis Division."

The history of the legal proceedings to which the defendant has been subjected for the alleged involvement with narcotics on or about September 24, 1962 in Indianapolis, Indiana, is necessary to reach a conclusion on the two grounds of the motion. The Court takes judicial notice of the following from its records in the cases entitled, United States of America v. Ronald K. Dennis, IP 62-Cr-191; Ronald K. Dennis v. United States of America, TH 64-C-6; United States of America v. Ronald K. Dennis, IP 64-Cr-33; and United States of America v. Lauer, EV 59-Cr-27, (7th Cir. 1961) 287 F.2d 633; Lauer v. United States, (7th Cir. 1963), 320 F.2d 187:

December 10, 1962

The complaint of the United States of America v. Ronald K. Dennis was filed charging a narcotics violation on or about September 24, 1962, of Title 28, U.S.C. [fol. 77] § 4705 (a).

December 12, 1962

The defendant was arrested on a warrant based on such complaint of December 10, 1962, and taken before the United States Commissioner on the same date and after appropriate proceedings was remanded to jail because of his not posting bond in an amount duly fixed by the Commissioner.

December 14, 1962

One count of the indictment was returned in the United States District Court, Southern District of Indiana, Indianapolis Division, entitled "United States of America v. Ronald K. Dennis, IP 62-Cr-191," which is quoted as follows:

"INDICTMENT"

The Grand Jury charges:

That on or about September 24, 1962, at Indianapolis, in the Indianapolis Division of the Southern District of Indiana, Ronald K. Dennis, the defendant herein, did knowingly, wilfully and unlawfully sell a narcotic drug as defined in Title 26, United States Code, Section 4731(a), to-wit: 450 milligrams, more or less, heroin hydrochloride, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by The Secretary of the Treasury or his delegate, in violation of Title 26 of United States Code, Section 4705(a)."

A bond of \$10,000 was set by the Court. Praecipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of this Court.

December 19, 1962

The Clerk issued a warrant to the United States Marshal who duly charged such warrant on the defendant and placed him in custody.

December 19, 1962

The following proceedings were had in open Court:

"Comes now the attorney for the Government, and the defendant appears in person and without counsel. The Court advises the defendant that he has the right to have an attorney and if financially unable to hire one, the Court will appoint counsel to represent [fol. 78] him without charge, and the defendant indicating that he does not want an attorney, the defendant executes and files a written waiver of counsel.

The Court explains to the defendant the nature of the charge and the rights awarded him under the Constitution and after being fully advised, the defendant having received a copy of the indictment and the same having been read to him in open court

by the attorney for the Government, now states that he thoroughly understands the nature of the charge against him, and being arraigned upon the indictment, for plea, says that he is guilty as charged. No pre-sentence investigation is directed by the Court."

WHEREUPON, the Court rendered judgment which is quoted as follows:

"On this 19th day of December, 1962, came the attorney for the Government and the defendant appeared in person and without counsel, having on this date waived counsel. No pre-sentence investigation having been directed by the Court,

"IT IS ADJUDGED that the defendant has been convicted upon his plea of Guilty of the offense of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U.S.C. Section 4705(a), as charged in the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"IT IS ADJUDGED that the defendant is guilty as charged and convicted.

"IT IS ADJUDGED THAT THE DEFENDANT IS HEREBY committed to the custody of the Attorney General or his authorized representative, for imprisonment for a period of Twenty (20) years, and for a study as described in 18 U.S.C. 4208(c), the results of such study to be furnished this Court within three (3) months, whereupon the sentence of imprisonment shall be subject to modification in accordance with 18 U.S.C. 4208(b).

"IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the

United States Marshal, or other qualified officer, and that the copy of the Judgment serve as the commitment of the defendant.

/s/ William E. Steckler
United States District Judge"

April 2, 1963

The Court entered the following order modifying judgment:

[fol. 79] "On this 2nd day of April, 1963, came the attorney for the Government and the defendant appeared in person and without counsel, having heretofore waived counsel. The Court now vacates defendant's waiver of counsel and appoints George Rich, a member of the bar of this Court, to represent him.

"The defendant having been convicted upon his plea of guilty of the offense of, on or about September 24, 1962, knowingly, wilfully and unlawfully selling a narcotic drug, not in pursuance of a written order of the person to whom said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of State, in violation of Title 26 U.S.C. Section 4705(a), as charged in the Indictment, and the defendant having on December 19, 1962, been committed to the custody of the Attorney General pursuant to Title 18 U.S.C. 4208(b) for imprisonment for a period of twenty (20) years and for a study as described in 18 U.S.C. 4208(c), and the Court having now received and considered the report of such study, and following the recommendations of the Bureau of Prisons,

"IT IS ORDERED AND ADJUDGED that the period of imprisonment be reduced to Five (5) years.

"IT IS ORDERED that the Clerk deliver two certified copies of this Order Modifying Judgment to the United States Marshal or other qualified officer.

/s/ William E. Steckler
United States District Judge"

July 17, 1963

The Seventh Circuit Court of Appeals published its opinion in the case of Lauer v. United States of America, 320 F.2d 187, in which it held that an indictment charging an offense of Title 26 U.S.C. § 4705(a) does not state an offense unless it names the buyer of the narcotics from the defendant-seller.

October, 1963

Defendant requested the Court to appoint counsel to represent him.

November 6, 1963

The Court denied defendant's request for the appointment of counsel.

November 12, 1963

The defendant again requested the Court to appoint [fol. 80] counsel to represent him indicating that he believed that the Lauer case entitled him to have his judgment and sentence vacated and set aside.

November 22, 1963

The Court again refused to appoint counsel to represent the defendant.

January 28, 1964

The case of Ronald K. Dennis v. United States of America, TH 64-C-6, seeks to have the judgment and conviction vacated and set aside pursuant to Title 28, U.S.C. § 2255 was filed.

January 29, 1964

The Court entered its order appointing Donald R. Metz to represent the defendant.

April 13, 1964

The Court entered the following Findings of Fact, Conclusions of Law and Judgment:

"This cause came on for hearing before the Court upon the petitioner's Motion for Relief under Section 2255, Title 28 U.S.C.A. filed January 28, 1964; the petitioner's Supplemental Motion and Brief filed April 8, 1964; and the respondent's Brief in Opposition filed April 9, 1964. Based upon the motion and briefs submitted, the petitioner's contention is that the indictment upon which he was sentenced and convicted was so defective on its face as to be insufficient to authorize the Judgment of Conviction, since the indictment and record failed to disclose the name of the purchaser to whom he was alleged to have sold the narcotics and he would, therefore, be unable to plead the Judgment as a bar in any subsequent prosecution for the same offense. In response to such assertion, the respondent claims that there is nothing in the record to indicate that the petitioner was prejudiced in any way by virtue of the indictment and record omitting the name of the purchaser and the indictment was sufficient under the general principles of law by which it must be tested.

"The parties having stipulated and agreed that the record in Cause No. IP-62-Cr-191 be admitted and read into evidence, and the Court having read and examined the briefs of both parties and having heard the arguments of counsel, and being duly advised in the premises, does submit its:

FINDINGS OF FACT

"1. The petitioner is now and was at the time of [fol. 81] instituting this action an inmate of the United States Penitentiary at Terre Haute, Indiana, and in the custody of the respondent.

"2. The petitioner is in such custody by reason of a Judgment and Commitment Order entered by this Court on December 19, 1962, and modified on April 2, 1963, in Cause No. IP 62-Cr-191, wherein the petitioner received five years for violating Title 26, U.S.C., Section 4705(a).

"3. Such Judgment and Commitment Order was rendered on an Indictment charging petitioner with a violation of Title 26, U.S.C., Section 4705(a) after a plea of guilty. The Indictment failed to set forth the name of the person to whom the alleged unlawful sale of narcotics was made and did not contain any allegations which would properly excuse or overcome such omission.

"4. The record does not disclose the name of the purchaser to whom the alleged unlawful sale of narcotics was made.

"5. The case of *Clay v. United States*, 326 F.2d 196 (10th Cir. 1963), relied upon by the respondent, is distinguishable from the case at bar for the reason that in *Clay* the name of the purchaser was identified in the record.

"Having fully considered the evidence and arguments of counsel, and based upon the foregoing findings of fact, the Court files the following:

CONCLUSIONS OF LAW

"1. By reason of the omission of the name of the alleged purchaser and the lack of any allegation properly executed for overcoming such omission and, on the authority of *Lauer v. United States*, 320 F.2d 187 (7th Cir. 1963), the Indictment upon which the petitioner entered a plea of guilty was so defective on its face that it failed to charge an offense of any kind, and the Court was without jurisdiction to enter such judgment and sentence.

"2. In view of the Indictment and the record failing to disclose the name of the purchaser to whom the petitioner was alleged to have sold the narcotics, the petitioner is unable to plead the judgment as a bar in any subsequent prosecution for the same offense.

3. Petitioner's Motion for Relief under Title 28, U.S.C. Section 2255, should be granted. The Judgment and Commitment Order entered on December 19, 1962, as modified on April 2, 1963, in United

States of America v. Ronald K. Dennis, Cause No. IP 62-Cr-191, should be vacated and set aside.

JUDGMENT

"IT IS ORDERED, ADJUDGED AND DECREED, that the Judgment and Commitment heretofore entered in United States of America v. Ronald K. Dennis, Cause No. IP 62-Cr-191, should be and hereby is vacated and set aside. It is further ordered that petitioner, Ronald K. Dennis, by and hereby is [fol. 82] immediately released and discharged from further imprisonment or liability under said judgment and commitment.

"Dated: April 13, 1964.

/s/ William E. Steckler
Judge, United States District Court"

April 10, 1964

The complaint of United States of America v. Ronald K. Dennis, Commissioner's Docket No. 3, Case No. 358, was filed in the Indianapolis Division, United States District Court, Southern District of Indiana, charging narcotics violation on or about September 24, 1962, under Title 26, U.S.C. §§ 4704(a) and 4705(a).

April 13, 1964

The defendant was arrested on a warrant based upon such complaint of April 10, 1964.

April, 1964

The defendant was taken before the United States Commissioner in the Indianapolis Division of this Court and after appropriate proceedings in which Mr. Donald R. Metz was appointed as counsel to represent Mr. Dennis, the defendant was remanded to jail because of his not posting bond in the amount duly fixed by the Commissioner.

June 15, 1964

A three count indictment was returned in the United States District Court, Southern District of Indiana, charging narcotics violation on or about September 24, 1962, of Title 26, U.S.C. §§ 4704(a) and 4705(a), entitled "United States of America v. Ronald K. Dennis, IP 64-Cr-84, which is quoted as follows:

"INDICTMENT"

Count I—26 U.S.C. 4705(a)

"The Grand Jury charges:

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division [fol. 83] of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully, wilfully and knowingly sell 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, to Cornelius C. Cooper, not in pursuance of a written order from the said Cornelius C. Cooper on a form issued by the Secretary of the Treasury of the United States or his authorized delegate, in violation of Title 26, United States Code, Section 4705(a), as amended by the Narcotics Control Act of 1956.

Count II—26 U.S.C. 4704(a)

"The Grand Jury further charges:

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did unlawfully sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, not in the original stamped package nor from the original stamped package; in violation of Title 26, United States Code, Section 4704(a), as amended by the Narcotics Control Act of 1956.

Count III—21 U.S.C. 174

"That on or about September 24, 1962, at Indianapolis, State of Indiana, in the Indianapolis Division of the Southern District of Indiana, and within the jurisdiction of this Court, the defendant, Ronald K. Dennis, did receive, conceal, facilitate, the transportation and concealment of, and sell to Cornelius C. Cooper, 450 milligrams, more or less, of heroin hydrochloride, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same had been unlawfully imported, in violation of Title 21, United States Code, Section 174, as amended by the Narcotics Control Act of 1956."

June 16, 1964

A praecipe for a warrant for the arrest of the defendant to answer the charge in this indictment was presented to the Clerk of the Court.

June 16, 1964

The Court issued a warrant to the United States Marshal who duly served such on the defendant and placed him in custody.

The defendant remains in custody awaiting arraignment on the indictment of June 15, 1964.

July 16, 1964

Defendant filed a motion to dismiss the indictment of [fol. 84] June 15, 1964. Defendant also filed a brief in support thereof.

July 23, 1964

The United States of America filed its answer in opposition to defendant's motion to dismiss the indictment.

Mr. Dennis has been in continuous confinement from the date of his first arrest on December 12, 1962 to the date of this entry and will remain in such confinement until the trial thereof in September 1964 depending upon

the action taken on this motion and appeals therefrom. This is a total of one year and approaching seven months. During the period of Mr. Dennis' confinement from December 19, 1962 to April 13, 1964, there was no opportunity for bail as the procedural laws of the United States made no provision therefor even though he was during this time illegally held on a judgment based on an indictment which did not charge a crime. During the period from December 10, 1962 to December 19, 1962, he was confined because of being unable to post the required bail of \$10,000.00 to answer to a complaint and indictment which did not charge a crime.

Prior to the July 17, 1963 decision of Lauer v. United States of America, 320 F.2d 187, the defendant and the United States Attorney believed that an indictment in the language of the statute defining the offense was the substantive and procedural law of the land. The government intentionally avoided using the prosecuting witnesses' names in all narcotic indictments. After July 17, 1963 and the Lauer decision, Mr. Dennis was faced with a confusing state of jurisprudence as were a number of defendants serving lengthy terms under similar indictments. Mr. Dennis could serve out his term of years based on a void judgment, or challenge the judgment immediately, or challenge the judgment after the statute of limitations had expired, or challenge the judgment after serving out his full term of the void judgment. In view of Title 18 U.S.C.A. §§ 3288 and 3289, there was no choice to Mr. [fol. 85] Dennis but to challenge the judgment immediately.

The government had full knowledge of the effect of the July 17, 1963 Lauer decision on the judgment and took no action whatever in expunging or vacating such Dennis judgment, nor in submitting the matter to the August and December 1963 terms of the Grand Jury and waited until defendant successfully took action to vacate the judgment.

The government then, for some reason unknown of record other than the expressed concern of the prospective liberation of a number of similarly convicted narcotic felons, caused the Grand Jury in June 1964 to reindict

Mr. Dennis for three narcotic offenses allegedly occurring on the same date growing out of the same transaction whereas the first indictment was for one narcotic offense allegedly occurring on the same date and apparently the same transaction referred to in the three offenses in the three count indictment.

This is not a case for charges of neglect against the government, or the defendant, Mr. Dennis. It is litigation resulting from inconsistencies in the developing law that cries out for relief to the defendant, Mr. Dennis. Mr. Dennis was not a belligerent offender. He pleaded guilty within five days of the indictment to get his jail term over. Mr. Dennis has served bailable and unbailable time in County Jails and Federal Penitentiaries since December 12, 1962, none of which time served can or will be credited to the lengthy mandatory sentence if defendant is convicted. Title 26 U.S.C.A. § 7237(b)(d) and Title 18 U.S.C.A. § 3568. If he is acquitted, he will already have served penitentiary time when there was no legal commitment.

The rights of Mr. Dennis under the Sixth Amendment of the United States Constitution quoted in part as follows has been violated by the combined events recited herein.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *, and to [fol. 86] be informed of the nature and cause of the accusation; * * *."

The Court now GRANTS the motion to dismiss the indictment as based on ground one and DENIES the motion as based on ground two. The indictment consisting of three counts returned June 15, 1964 is dismissed and the United States Marshal is ORDERED to release the defendant forthwith.

Dated this 30 day of July, 1964.

/s/ Cale J. Holder
Judge, United States District
Court Southern District of Indiana

[fol. 87]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[File Endorsement Omitted]

Cause No. IP 64-Cr-84

UNITED STATES OF AMERICA

v.

RONALD K. DENNIS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—filed August 28, 1964

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the Order entered in this action on July 30, 1964, dismissing the indictment in three counts charging the defendant with narcotics offenses in violation of Title 26, United States Code, Sections 4705(a) and 4704(a), and Title 21, United States Code, Section 174, on the ground that a trial upon such indictment would violate the defendant's right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States.

This appeal is taken pursuant to Title 18, United States Code, Section 3731.

* * * *

III. The following question is presented by this appeal.

The defendant entered a plea of guilty to a one-count indictment charging a narcotics offense in violation of Title 26, United States Code, Section 4705(a), on December 19, 1962; on April 2, 1963, after a study and report pursuant to Title 18, United States Code, Section 4208, [fol. 88] the defendant's sentence was reduced to the mandatory minimum for a first offender of five years.

On April 13, 1964, the trial court granted the defendant's motion to vacate that sentence on the ground that the purchaser of the narcotics was not named in the indictment, as required by the decision of the United States Court of Appeals for the Seventh Circuit in Lauer v. United States, 320 F.2d 187, decided July 17, 1963. On June 15, 1964, a new three-count indictment was returned by the grand jury, charging the defendant with narcotics offenses arising out of the same transactions which were the subject of the 1962 indictment. The question thus presented is whether under these circumstances the trial of this defendant upon the present indictment would violate his right to a speedy trial guaranteed by the Sixth Amendment of the Constitution of the United States.

Richard P. Stein
United States Attorney

/s/ David W. Mernitz
Assistant United States Attorney

/s/ Robert W. Geddes
Assistant United States Attorney

[fol. 89]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-CR-84

UNITED STATES OF AMERICA

v.

RONALD K. DENNIS

ORDER EXTENDING TIME—October 23, 1964

Upon motion of the United States of America pursuant to Rule 13 of the Supreme Court of the United States, and for good cause shown, the court now orders that the time to docket this case and file the record thereof with the Supreme Court of the United States be extended for a period of 30 days, to and including November 26, 1964.

Dated this 23 day of October, 1964.

/s/ Cale J. Holder

Judge, United States District Court
Southern District of Indiana

[fol. 90]

[Clerk's Certificate to foregoing
transcript omitted in printing.]

[fol. 91]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 64-CR-84

UNITED STATES OF AMERICA

v.

RONALD K. DENNIS

SUPPLEMENTAL ORDER EXTENDING TIME—
November 25, 1964

Upon motion of the United States of America pursuant to Rule 13 of the Supreme Court of the United States, and for good cause shown, the court now orders that the time to docket this case and file the record thereof with the Supreme Court of the United States be extended for a period of 15 days, to and including December 11, 1964.

Dated this 25 day of November, 1964.

CALE J. HOLDER
Judge, United States District Court

[fol. 92]

SUPREME COURT OF THE UNITED STATES

No. 750, October Term, 1964

UNITED STATES, APPELLANT,

v.

CLARENCE EWELL AND RONALD K. DENNIS

ORDER NOTING PROBABLE JURISDICTION—May 17, 1965

APPEAL from the United States District Court for
the Southern District of Indiana.

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted and the case is placed on the summary
calendar.

